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No. 02-1733

In The
Supreme Court of the United States

NATIONAL RIGHT TO LIFE COMMITTEE, INC. *et al.*,
Appellants/Cross-Appellees,
v.
FEDERAL ELECTION COMMISSION *et al.*,
Appellees/Cross-Appellants

On Appeal from the United States District Court
for the District of Columbia

Reply Brief of Appellants/Cross-Appellees National Right to Life Committee *et al.*

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Corporate Disclosure Statement

As stated in the *Jurisdictional Statement*, none of the appellants has a parent corporation and no publicly held company owns ten percent or more of the stock of any of the appellants. Rule 29.6.

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Glossary

BCRA ..... Bipartisan Campaign Reform Act of 2002
CFG ..... Club for Growth
FEC ..... Federal Election Commission
FECA ..... Federal Election Campaign Act
GOTV ..... get out the vote
JA ..... *Joint Appendix*
JDT ..... Joint Deposition Transcripts
JMC Plaintiffs .....
present plaintiffs-appellants/cross-appellees in trial court
JS ..... *Jurisdictional Statement*
JSA ..... *Jurisdictional Statement Appendix*
NRLC ..... National Right to Life Committee
NRL ETF ..... NRL Educational Trust Fund
NRL PAC ..... NRL Political Action Committee
NRLC Plaintiffs .....
present plaintiffs-appellants/cross-appellees in this brief
PCS ..... Plaintiffs' Consolidated Evidentiary Submission
SA ... *Supplemental Appendix to Jurisdictional Statements*

ARGUMENT[1]

I. Blurring Key Distinctions: How BCRA Assaults People of Ordinary Means.

The briefing confirms what Appellants ("NRLC Plaintiffs") observed in their opening brief – that the "electioneering communications" debate hinges on two views of issue advocacy. NRLC Br. 3. Defendants insist they should be able to restrict anything that affects elections, including issue advocacy, either without limitation or at least if done by a corporation. Plaintiffs believe that issue advocacy by incorporated citizen groups is essential to participation by persons of ordinary means in our democratic republic and is protected from abridgement by the First Amendment, even if it affects elections.

As to regulating the activities of corporations, Defendants rely on cases permitting the regulation of direct political activity of corporations but ignore key distinctions established by this Court that apply especially to the right of people of ordinary means to band together in citizen groups (incorporated for liability purposes) to amplify their voices so they can be heard in the marketplace of ideas. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ."). These groups are the only means by which citizens of ordinary means can make their opinions effectively heard. *See National Conservative Political Action Committee v. FEC*, 470 U.S. 480, 495 (1985) ("To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources."). Barring unfettered issue advocacy by groups bars citizens of ordinary means from participation in all aspects of government.

---

[1]NRLC Plaintiffs adopt consistent arguments made by other plaintiff groups in their briefing.

Wealthy individuals have no need of citizens groups because they are permitted to freely spend their own money for issue advocacy or "electioneering communications." Corporations owning broadcast stations are exempted from any restrictions on "electioneering communications." Incumbent politicians promote themselves and the issues they support through taxpayer-supported government activities and their political campaigns. Thus, BCRA further enhances these powerful voices by stripping ordinary citizens of their only means of effective participation in public debate, i.e., incorporated citizen groups.

But this Court has made key distinctions that Defendants blur to assert precedential support for BCRA. Examining these vital distinctions reveals that Defendants' appeal to cases permitting regulation of direct political activity of corporations provides no support for the BCRA.

A. The Blurred Issue/Express Advocacy Distinction: The First Amendment Protects Issue Advocacy.

The first key distinction that Defendants blur is the sharp one this Court created between issue advocacy and express advocacy. Judge Kollar-Kotelly's opinion below demonstrates the fruit of Defendants' effort to blur the line between issue advocacy and express advocacy by moving the focus elsewhere. She attempted to demonstrate that *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), drew the critical distinction, not between issue advocacy and express advocacy, but between "[1] issue discussion and [2] advocacy of a political result." SA 792-93sa.

But NRLC Plaintiffs provided eight pages of textual analysis establishing that this Court actually drew the critical distinction between "[1] discussion of issues and candidates and [2] advocacy of election or defeat of candidates," *MCFL*, 479 U.S. at 249, and that what this Court held in *Buckley* and *MCFL* was that the First Amendment requires that where government restrictions border on

issue advocacy, issue advocacy must be protected by a bright-line test that examines the words of a communication to see if it contains explicit words of advocacy of the election or defeat of a clearly identified candidate. NRLC Br. 4-12.

Although the limited textual analysis in the numerous lower federal cases that followed this Court's express advocacy test was a key factor in the lower court's dismissal – as mere "dicta" – of those cases, *see* NRLC Br. 12-14 (answering the "dicta" charge), the Government and Intervenor Defendants made no effort to respond to NRLC Plaintiffs' careful textual analysis. Instead, Defendants continue to assert the now discredited argument that *Buckley* and *MCFL* were just about avoiding vagueness and creating bright lines, ignoring the carefully-articulated, substantive constitutional mandate of *Buckley* and *MCFL* that issue advocacy must be protected from regulation by the express advocacy test. NRLC Br. 4-14.

So while there is precedent for the general proposition that corporations are subject to more government regulation than associations, this general rule has been qualified by the protection for issue advocacy, which this Court held that the First Amendment guarantees to corporations.

B. The Blurred Contribution/Independent Expenditure Distinction: The PAC Alternative Is Inadequate.

The second key distinction Defendants blur is between contributions and independent expenditures. This shows up most starkly in Defendants' effort to make *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), support the notion that requiring citizen groups to do *issue advocacy* through a PAC adequately protects their free expression and association rights.

But the sole issue in *Beaumont* was whether a nonprofit ideological corporation that qualified for the *MCFL* exemption from the statutory ban on independent expenditures could also make *contributions*. And this Court clearly articulated that the decision

hinged on the distinction between independent expenditures and contributions:

> NCRL cannot prevail, then, simply by arguing that a ban on an advocacy corporation's direct *contributions* is bad tailoring. NCRL would have to demonstrate that the law violated the First Amendment in allowing *contributions* to be made only through its PAC and subject to a PAC's administrative burdens. But a unanimous Court in *National Right to Work* did not think the regulatory burdens on PACs, including restrictions on their ability to solicit funds, rendered a PAC unconstitutional as an advocacy corporation's sole avenue for making political *contributions*. See 459 U.S., at 201-202, 103 S.Ct. 552. There is no reason to think the burden on advocacy corporations is any greater today, or to reach a different conclusion here. [*Beaumont*, 123 S. Ct. at 2211 (emphasis added).]

So *Beaumont* plainly stands solely for the proposition that requiring corporations, even *MCFL*-types, to use the PAC alternative for *contributions* is not an unconstitutional burden.

But *MCFL* had already established that requiring the PAC alternative for *independent expenditures* by *MCFL*-type corporations was an unconstitutional burden. *MCFL*, 479 U.S. at 252-55. *A fortiori* it would be an unconstitutional burden to require *issue advocacy* or "electioneering communications" to be done through a PAC.

C. The *MCFL*-Exemption Is Inadequate.

Defendants tout BCRA's "*MCFL*-exemption" as permitting certain corporations to engage in now prohibited issue advocacy. NRLC Plaintiffs adopt arguments by others on the inadequacies of the overly-cramped statutory exemption, making only the point that this also represents an enormous expansion of the law. Since *First National Bank v. Bellotti*, 435 U.S. 765 (1978), all corporations have been free to engage in issue advocacy. That decision, along

with others would have to be overturned to sustain BCRA's "electioneering communications" restrictions.

D. Plaintiffs Have Made an Inadequate Showing to Overcome Stare Decisis for Numerous Precedents.

NRLC Plaintiffs set out this Court's standards for overruling prior decisions and demonstrated how BCRA's required overruling of precedents did not fit the standards. NRLC Br. 15-18. Defendants made no direct response to these arguments. However, their primary approach is to argue that this Court's express advocacy test is outmoded because of "new" facts proving circumvention. *See* FEC Br. 80-82.

1. Alleged "New" Facts Are Irrelevant, Flawed, and Do Not Justify Eliminating an Essential Element of Representative Democracy at Key Times.

As to alleged "new" facts, NRLC Plaintiffs note three things. First, as already noted, NRLC Br. 7-8 & n.8, this Court in *Buckley* noted that issue advocacy could affect elections, but established the express advocacy test anyway to protect issue advocacy because issue advocacy is vital to citizen participation in our system of government. *Buckley*, 424 U.S. at 14, 45; *cf.* SA 353sa (Henderson). This makes "new" facts that the people are actually engaged in issue advocacy that may affect elections irrelevant.

Second, Defendants rely primarily on their disputed studies. NRLC Plaintiffs adopt the arguments of others regarding the problems with those studies but note one critical flaw in the assertions by the Government Defendants that most modern campaign advertisements by candidates do not contain express advocacy. FEC Br. 82-83, and the lower court, SA 658sa (Kollar-Kotelly), 1296sa (Leon). The flaw is that these studies uniformly ignore the presence of the "disclaimer" that must be on candidate's public communications. 11 C.F.R. § 110.11(b)(1). These disclaimers themselves are express advocacy. *Buckley*, 424 U.S. at 44 n.52 ("express words of advocacy of election or defeat, such as

'Smith for Congress'"); 11 C.F.R. § 100.22(a) ("*Expressly advocating* means any communication that – (a) Uses phrases such as . . . "Smith for Congress," "Bill McKay in '94," . . . "Carter '76," "Reagan/Bush," or "Mondale!"). The required disclaimers provide the express advocacy message.

Third, in the debate over the *quantitative* number of "genuine issue ads" (itself a debated concept) a *qualitative* element has been largely neglected, namely, that the "electioneering communication" restrictions would eliminate a whole *category* of American political speech by citizen groups for nearly a fourth of a year (counting only 30 days before primaries and 60 days before elections without considering areas, such as the District of Columbia, where broadcasting reaches multiple jurisdictions).

That whole category of speech is *grass roots lobbying*, in which Citizens Associated for Amplified Free Expression, Inc. – during the bustling days of legislative activity just before the fall election as representatives try to ram through bills to buy votes before taking a recess to run home for final campaigning before the polls open – buys broadcast ads in the district of the legislator with an important vote needed to pass legislation protecting the nation from ruin by encouraging citizens to "Call Representative Swing-Vote and ask her to vote for the bill sponsored by Representatives Commonweal and Controversy."

Defendants assertions that (1) "'genuine' issue advocacy can readily be accomplished in a manner that does not trigger Title II of BCRA," FEC Br. 93, and (2) that "it is not necessary to refer to 'specific candidates for federal office in order to create effective [issue] ads." *id.* (citation omitted), simply does not apply to grass roots lobbying. And citizen groups need to remain free to engage in grass roots lobbying through the media that Defendants concede is the most effective, FEC Br. 93, during the time when legislation is being considered, which often can and often does fall during the days just before an election – the timing of which is wholly beyond

the control of citizen groups and wholly in the hands of incumbent politicians.

Grass roots lobbying is a fundamental part of our system of representative government that must remain available whenever it is needed. It is not "a few 'marginal applications.'" FEC Br. 105 (citation omitted). And it is profoundly, negatively affected by Title II of BCRA. No statute can be called narrowly tailored that so grievously and permanently wounds the essence of representative government. That fact has not changed.

2. Circumvention Is an Auto-Expanding Rationale.

As to the notion that organizations have *circumvented* current election laws and so must be cabined, there are several problems. First, the situation might be differently, but accurately, described as organizations simply doing what this Court said the First Amendment gave them a right to do, i.e., issue advocacy while eschewing express advocacy. *Buckley*, 424 U.S. at 43 n. 50 ("As long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."). How can spending money on what is legal properly be described as circumvention? What is sinister about engaging in legal association and free expression? Rather, there is something sinister (i.e., threatening great risk of harm to the Constitution and the American system of government) about describing the exercise of a constitutional right as circumvention of the law. The First Amendment is not some loophole needing to be plugged. If there is a bright dividing line between what is permissible and what is not, there is nothing wrong or sinister about standing with others on the permissible side of the line and combining one's voice with others to speak often, loudly, and long.

Second, the "circumvention" rationale has no end. As long as any freedom remains, people will exercise their freedom, which will spawn calls to further cabin such circumvention activity. If BCRA's

sponsors succeed in banning *broadcast* electioneering communications, they will next pursue a ban on printed communications (including voter guides), phone banks, and the like. The circumvention rationale, that would uphold a broadcast ban, would immediately justify its extention to other media as soon the broadcast ban is upheld, i.e., organizations switching to Internet, print, and phone communications will be "circumventing" the broadcast ban.[2]

In response to an underinclusion challenge, Defendants have already argued that they are permitted to go step by step. Where will it end? This auto-expanding rationale must be forcefully rejected

[2]States with a temporal ban on communications naming candidates, have banned not only broadcast communications but all such public communications. *See Right To Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998) (striking down rule that banned all corporate or union communications using the name or likeness of a candidate for 45 days before an election); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998) (same); *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2d Cir. 2000) (striking down reporting requirement for mass media communications with candidate's name or likeness); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001) (striking down disclosure requirement if print or broadcast material names candidate); Alaska Stat. § 15.13.400(14) (banning all "electioneering communications," i.e., that identify a candidate's position on a regionally important issue within 30 days of an election); Ariz. Rev. Stat. § 16-901.01.A.2 (banning communications that "expressly advocate," i.e., "[m]aking a general communication, such as in a broadcast medium, newspaper, magazine, billboard, or direct mailer referring to one or more clearly identified candidates and targeted to the electorate of that candidate(s) . . . (b) in the sixteen-week period immediately preceding a general election"); Colorado Const. Am. 27, §§ 2(7) and 6 (banning all "electioneering communications," i.e., that identify a candidate 30 days before a primary and 60 days before a general election); Conn. Gen. Stat. 9-333c (defining regulated "expenditure" as either broadcast or print communication that names a candidate and appears 90 days before an election); Haw. Rev. Stat. § 11-207.6 (banning ads referring to a candidate that are broadcast, published in any periodical or newspaper, or sent by bulk mail 30 days before a primary and 60 days before a general election).

before it consumes all of citizens participation in American democracy. This Court's express advocacy test drew precisely the correct, and only possible, line that properly balances free association, free expression, the need of citizens of ordinary means to participate in the political system, and the need for a corruption-free political system.

3. There Is International Support for Unfettered Issue Advocacy.

In arguing that the standards for reversing precedent have not been met, i.e., that the *Buckley* and *MCFL* holdings have not been "undermined by subsequent changes or developments in the law," NRLC Br. 15 (citation omitted), NRLC Plaintiffs noted that "unfettered issue advocacy enjoys international support." NRLC Br. 15 n.18. Defendants failed to respond to this argument, but the *Brief of Amici Curiae International Experts in Support of Appellees/Cross-Appellants* ("International Br.") responded in some curious ways.

First, the amici brief mischaracterized what NRLC Plaintiffs said, stating that "[i]f . . . [NRLC Plaintiffs] suggest that other countries do not generally impose restrictions on *paid political advertising* they are simply wrong." International Br. at 10 (emphasis added). Only in footnote did they acknowledge that NRLC Plaintiffs might be saying something other than the strawman created in text:

> An alternative reading of [NRLC Plaintiffs'] proclamation is that other countries do not restrict the advertisement of *issue-oriented* (and non-election-related) political messages. Whether this claim is true or not, it is irrelevant to the case at hand. There is no question here as to whether BCRA may proscribe the use of such funds for true issue-oriented advertisements, [sic] because the statute does not attempt to limit such advertisements by unions and corporations. The degree to which other countries support issue-

oriented, non-election related advocacy therefore does not speak to the question before the Court. [*Id.* at 10 n.25.]

Amici misunderstand the arguments in this case, such as the issue of BCRA's effect on grass roots lobbying.[3]

Second, amici invest a great deal of time saying what various countries do in terms that are meaningless because they are undefined, and so do not inform the reader whether the restriction is on express advocacy, issue advocacy, or some attempted hybrid such as "electioneering communications." The amici's brief uses "paid political advertising" the most ofen, but it is never defined. So what does it mean when amici say that "[t]he substantial majority of developed nations ... impose burdens on *paid political advertising* that are much more restrictive than those mandated under BCRA?" *Id.* at 10-11 (emphasis added). Does this mean these nations restrict express advocacy, issue advocacy, issue advocacy that happens to coincide with an election, or "electioneering communications?" Do these restrictions apply to candidate advertising, political party advertising, broadcast ads, print ads, bulk mail ads, phone banks, or what?

Only occasionally do amici tell us what a nation actually prohibits, such as when it says that Israel has "a complex and restrictive regime governing *political broadcasts*," *id.* at 13, and provides a footnote, *id.* at 13 n.38, further saying that Israel's high court called it "election propaganda" (phrases that are so vague as

[3]Plainly the argument made by NRLC Plaintiffs has been that this Court correctly held that the First Amendment protects the right of citizens to associate in issue advocacy corporations for the purpose of engaging in unfettered issue advocacy, even if some of it might affect elections. In this particular case, there has been no debate over issue advocacy that might not have some effect on elections, and the precise focus of the case has been whether this Court's holdings in *Buckley* and *MCFL* that the proper dividing line for protecting issue advocacy is the express advocacy test should be overruled. Therefore, amici's two characterizations of NRLC Plaintiffs' position are both wide of the mark and fail to comprehend the debate.

to be useless). Australia is said to even ban "issue advocacy" for three months before an election, although the phrase is undefined, and it is difficult to imagine that Aussies are banned from promoting, say, the "issue" of legislation to ban sport utility vehicles in portions of the Outback for three months before every election.

The terms being undefined, it is all a meaningless comparison of apples and oranges, without even the ability to tell whether a ban is in the apple or orange basket, or is instead a kiwi. So when we learn that Paraguay bans "political advertising" for two days before an election and does not allow it to begin until 60 days before an election, *id.* at 15 n.47, we can't respond with "Well, if Paraguay does it, so should we" because we don't know what "it" is. And on the subject of Paraguay, there's a world of difference between a two day ban and a sixty day ban, even if both were dealing with "electioneering communications" as defined in BCRA.

Third, amici attempt to make the two cases that NRLC Plaintiffs cited, NRLC Br. 15 n.18, support their position. These cases involved election-related restrictions in two countries very close to our common-law tradition, Canada[4] and Great Britain.

As to the Canadian case, *Harper v. Canada*, 2002 ABCA 301 (2002) – with its on-point quote about a one-day blackout on "election advertising" violating the Charter because it encompassed "tak[ing] a position on an issue with which a registered party or candidate is associated," and so "encroached upon the freedom of expression of those who seek to voice public concerns which are inconsequential to partisan advocacy," *see* NRLC Br. 15 n.18 (providing citations) – amici simply make that case disappear with remarkable prestidigitation. A search of their Table of Authorities reveals that without doubt the case has vanished.

[4] At least Canada has a Charter that protects free expression and association in a manner similar to the U.S. Constitution, as amici concede. International Br. 18-19.

In the place of the vanished *Harper* case, amici substitute another Canadian case that they represent as "*reluctantly* conclud[ing] that . . . [a] near-total ban on third-party spending" that prohibited many from participating in advocating or opposing referenda "went too far." International Br. 20 (emphasis added). "Reluctantly" or not, the *holding* of the court was that people couldn't be shut out from participation in issue advocacy. But seeking to make this on-point holding also disappear, amici move from irrelevant speculation about "reluctance" to the Court's discussion of a statute and a case that amici openly acknowledge was "not before it." *Id.* 20-21. Amici apparently like what the court said about matters not before it, but such comments are obiter dictum. Remarkable.

As to the ECHR case of *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1 (1986), which struck down British restrictions that "operated, for all practical purposes . . . as a total barrier to Mrs Bowman's publishing information with a view to influencing the voters of Halifax in favour of an anti-abortion candidate," *id.* at ¶ 47, amici attempt another feat of legerdemain to make this case disappear. Amici claim, with many italicized flourishes, that some of the quotes in the brief description of the case, NRLC Br. 15 n. 18, were not actually things the *court* said but were part of a report presented to the court. International Br. 25-26. But the quoted portions were all part of the court's *opinion*, provided with appropriate paragraph citations to briefly set the factual pattern and then the holding of the case.

And the case doesn't disappear under more extended examination. This was a case about voter guides that set forth candidates' positions on abortion and human embryo experimentation. *Bowman*, 26 Eur. Ct. H.R. at ¶¶ 10-12 (court opinion section entitled "Facts"). Mrs. Bowman, the executive director of the Society for the Protection of the Unborn Child, distributed 25,000 copies of her leaflet "immediately before the Parliamentary elections in April

1992" in Halifax, where she was charged with violating a statute that permitted her to only spend five pounds sterling for such issue advocacy "to electors with a view to promoting or procuring the election of a candidate. *Id.* at ¶¶ 10, 12, 13.

Her leaflet began with the words, "We are not telling you how to vote, but it is essential for you to check on Candidates' voting intentions on abortion and the use of the human embryo as a guinea pig," and proceeded to describe the positions of three candidates, two of whom seemed favorable to the SPUC position and the other opposed. At the bottom it said in bold, capital letters the name of the organization (SPUC). On the back was a photograph labeled "unborn baby ten weeks after conception" and a description of fetal development. *Id.* at ¶ 12. Pure issue advocacy.

What did the court say? In the section labeled "Judgment," the court

> f[ound] it significant that the limitation . . . was set as low as £500. It recalls that this restriction applied only during the four to six weeks preceding the general election. [footnote] However, although it is true that Mrs Bowman could have campaigned freely at any other time, this would not, in the Court's view, have served her purpose of publishing the leaflets which was, at the very least, to inform the people of Halifax about the three candidates' voting records and attitudes on abortion, during the critical period when their minds were focused on their choice of representative. [*Id.* at ¶ 45.]

The parallels to arguments made in the present case by Defendants are too obvious to require explanation. Paragraph 46 went on to explain that the law had taken away Mrs. Bowman's chosen means of communication, leaving her without "effective channels" to communicate her message. One is, of course, reminded that BCRA's ban on broadcast communications is justified by Defen-

dants because the broadcast media are the most effective communication channels.

The Court then went on to its holding:

> In summary, therefore, the Court finds that . . . the Act operated, for all practical purposes, as a total barrier to Mrs Bowman's publishing information with a view to influencing the voters of Halifax in favour of an anti-abortion candidate. . . . It accordingly concludes that the restriction in question was disproportionate to the aim pursued. [*Id.* at ¶ 47.]

NRLC Plaintiffs stand by their assertion that these two cases demonstrate international support for issue advocacy. There is no legal change justifying the overruling of this Court's protection of issue advocacy.

4. This Court Would Have to Overturn Multiple Cases to Uphold the Electioneering Communications Restrictions.

To approve BCRA's "electioneering communication" restrictions would require this Court to overrule not only *Buckley* and *MCFL*, and *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), as to the express advocacy test and the protection of corporate issue advocacy, but also other holdings, including all cases recognizing the right of corporations to engage in issue advocacy must be rejected, reaching back to *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978).

Buckley would also have to be overruled as to its holding that independent speech poses no threat of corruption. *Buckley*, 424 U.S. at 45. *MCFL* would have to be overruled as to its holding that forcing nonprofit ideological corporations to use the PAC alternative for making independent expenditures was an inadequate protection of their constitutional rights. *MCFL*, 479 U.S. at 252-55.

The whole line of cases that make the distinction between contributions and independent expenditures would have to be

overruled as to the significance of that distinction, extending from *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) (*NRWC*), to *FEC v. Beaumont*, 123 S. Ct. 2200.

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981), would have to be overruled, as to its holding that a $250 limit on the amount that could be given to a ballot measure committee was not just a contribution limit but was a regulation of an expenditure, if Defendants prevail on their argument that BCRA really doesn't really limit expenditures by groups.

Mills v. Alabama, 384 U.S. 214 (1966), would have to be overruled as to its rejection of the argument that speech at election time could be regulated because the whole rest of the year was available and its holding that election time was the most important and most protected time for speech related to elections.

II. From Quid Pro Quo to "Gratitude": How BCRA Assaults Representative Democracy.

In *Buckley*, this Court began with a clearly articulated concept of corruption as a quid pro quo exchange, i.e., dollars for votes or a last-minute endorsement by a rival candidate for promised appointment. *See Buckley*, 424 U.S. at 24; *NCPAC*, 470 U.S. 480. In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 389 (2000) (*Shrink*), this Court expanded corruption slightly to "a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."

Now Defendants urge this Court to consider "gratitude" for support as corrupting to our political system. But gratitude is one of those auto-expanding concepts, as circumvention was described above. Politicians will be grateful for any sort of support they receive. If the law restricts present means of engaging in activity for which candidates would be grateful, then citizen groups will do other things for which candidates will be grateful. Those things will then be capable of being banned on the basis of grateful candidates.

And candidates are already grateful for endorsements, editorials, appearance by celebrities at their events, volunteers, and so on. Should all these be banned?

This is another line that needs to be drawn firmly now, lest it devour our American system of government. Because the only way to eliminate gratitude is to eliminate all things for which candidates can be grateful. This requires elimination of elections and thus our representative democracy. There is a compelling interest in protecting the best system of governance yet devised from those who would destroy it in the name of fixing it.

III. The Independent Speech of State Candidates and Officeholders Cannot Be Subjected To Federal Contribution Limits And Disclosure Requirements.

In support of § 323(f)'s restrictions on state candidates and office-holders, the Defendants essentially argue that the statute is drawn narrowly because it prevents state candidates from being used as a means of influencing federal elections without complying with federal regulations. FEC Br. 58-60, Interv. Br. 39. However, this argument ignores the standards set by this Court for evaluating both reporting requirements and contribution limits, each of which is violated by this restriction.

With regard to reporting and disclosure requirements, it is undisputed that this restriction violates the express advocacy test which this Court has established as the regulatory boundary. *Buckley*, 424 U.S. at 80-81. Indeed, the use of subjective terms such as "attack" or "support" raise the precise vagueness problems that necessitated the use of express advocacy as a bright line standard. *Id.* at 41-44.

General Pryor's own communications amply demonstrate the vagueness and overbreadth inherent to this content-based restriction upon his speech. One of his flyers includes a full page picture of himself shaking hands with President Bush, with the caption that "Bush appointed Pryor to be Alabama co-chairman of the George

W. Bush for President campaign." Pryor Decl., Ex. A, 8 PCS/MC 43. Another displays the two men shaking hands directly above the phrase "Protecting the Security, Integrity, and Future of Alabama." Pryor Decl., Ex. A, 8 PCS/MC 45. While the context of each focused upon General Pryor's re-election, either could easily have been viewed as supporting President Bush as well. Thus, there can be little doubt that this provision will have chilling consequences on numerous candidates during the coming primaries as it threatens double regulation upon Republicans who tout their support for President Bush, and upon Democrats who wish to burnish their credentials to the party faithful by attacking the President or by touting their support for one of the Democratic candidates.

Importantly, this restriction targets speech that will necessarily be intended to promote state candidacies. Unlike other organizations whose purposes may encompass aiding the election or defeat of federal candidates, the campaign committee of a candidate for state office is charged solely with promoting the election of that state candidate. Any impact on federal campaigns is necessarily incidental to accomplishing such election. While such candidates may refer to a federal candidate or officeholder as a means of establishing their own reputations or positions, there is no basis in logic or the record to suggest that state candidates will divert resources contributed to their own campaigns to support federal candidates, unless such efforts are viewed as beneficial to their own elections.

With regard to the federal contribution limits triggered by this provision, the anti-conduit justification is inapplicable, because the money never reaches a federal candidate but is instead used for independent communications.[5] This Court has never upheld limits on contributions that did not ultimately flow to candidates, but has struck down limits on contributions to entities which lacked the anti-

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[5]Disclosure regulations are based upon an informational interest that does encompass some independent communications. *Buckley*, 424 U.S. at 81.

corruption justification that supports limitations on contributions to candidates. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290. While limits on contributions to entities that contribute to candidates can be regulated as corruption-risking conduits, such justification evaporates when the money is used only for independent communications. As Justice Blackmun explained, while organizations that contribute to candidates are essentially conduits that "pose a perceived threat of actual or potential corruption" but "contributions to a committee that makes only independent expenditures pose no such threat." *California Medical Association v. FEC*, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring).

Although this Court has not directly forbidden limitations on contributions for independent communications, limiting such contributions would ignore the "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *NCPAC*, 470 U.S. at 497. The independence from the federal candidate, "not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id.* (quoting *Buckley*, 424 U.S. at 47). Naturally, the link between candidates and those who contribute to independent speakers is even more attenuated. As this Court has recognized, "an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same . . . independent expenditure made directly by that donor." *Colorado Republican Federal Election Campaign Committee v. FEC*, 518 U.S. 604, 617 (1996). Moreover, placing a limit "on individuals wishing to band together . . . while placing none on individuals acting alone, is clearly a restraint on the right of association," that "cannot be allowed to hobble the collective expressions of a group." *Citizens Against Rent Control*, 454 U.S. at 296. Hence, there can

be no basis for prohibiting persons from contributing $2,001 to a state candidate, who independently mentions the name of a federal candidate, while allowing donors to individually spend millions of dollars to run the same ad themselves.[6]

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[6]Defendants failed to respond to (1) the problems Rep. Pence articulated concerning the raising of funds for Indiana Family Institute and the absence of any public perception of corruption in the relationship, NRLC Br. 36-39, (2) the standing to intervene of Sen. McCain et al., NRLC Br. 46-49, relying instead, Interv. Br. 11 n.8, on the district court opinion which is appended hereto because it was not included in the Joint Appendix, and (3) NRLC's description of a specific example demonstrating the potential for opposition mischief pose by treating a contract to broadcast as an actual communication. NRLC Br.44-46.

As to the point about treating a contract as a communication, NRLC Plaintiffs rely on arguments made by other plaintiffs but note that Defendants' argument that treating an "expenditure" as a communication is justified because FECA defines "expenditure" to include a contract for an expenditure, FEC Br. 122, is flawed. The definition of "independent expenditure" (far more relevant because it is about the actual communication), requires a" communication." *See* 11 C.F.R. § 100.16 ("The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate . . . .").

Conclusion

For the foregoing reasons, this Court should strike down Title I's bans on "soft money" use by political parties, federal officeholders and candidates, state officeholders and candidates, Title II's ban on "electioneering communications," and § 201(5)'s "advance notice" requirement as violating constitutional free expression and association guarantees. Also, this Court should hold that the grant of intervention to Sen. McCain et al. was erroneous.

Respectfully submitted,

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APPENDIX

ORDER GRANTING MOTION TO INTERVENE
[Docket #40]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed May 3, 2003]

SENATOR MITCH McCONNELL, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-582 (CKK, KLH, RJL)

NRA, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-581 (CKK, KLH, RJL)

ECHOLS, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-633 (CKK, KLH, RJL)

[*2]

CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-751 (CKK, KLH, RJL)
NATIONAL ASSOCIATION OF BROADCASTERS, Plaintiff, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-753 (CKK, KLH, RJL)
AFL-CIO, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-754 (CKK, KLH, RJL)
[*3] CONGRESSMAN RON PAUL, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-781 (CKK, KLH, RJL)

ORDER GRANTING MOTION TO INTERVENE
(May 3, 2002)

Pursuant to Rule 24(a)(1) of the Federal Rules of Civil Procedure and section 403(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA or Act), Senators John McCain, Russell Feingold, Olympia Snowe and James Jeffords and Representatives Christopher Shays and Martin Meehan (movants) move to intervene in these consolidated actions to defend BCRA's constitutionality. While the defendants do not object to the motion, several of the plaintiffs (objectors)[1] oppose it on the ground that the movants "do no have the requisite Article III standing" to support intervention. Opp'n at 3 (capitalization [*4] altered). We disagree. Accordingly, and for the following reasons, the motion to intervene is granted.

Rule 24(a)(1) provides that "[u]pon timely application anyone shall be permitted to intervene in an action . . . when a statute of the United States confers an unconditional right to intervene." Fed. R. Civ. P. 24(a)(1). Section 403(b) of the Act, in turn provides that

> [i]n any action in which the constitutionality of any provision of this Act or any amendment made by this Act is raised . . . any member of the House of Representatives . . . or Senate shall have the right

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[1]Specifically, Representative Mike Pence, Alabama Attorney General Bill Pryor, Libertarian National Committee, Inc., Alabama Republican Executive Committee, Libertarian Party of Illinois, DuPage Political Action Council, Jefferson County Republican Executive Committee, Christian Coalition of America, Inc., Club for Growth, Indiana Family Institute, National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, Martin J. Connors and Barret Austin O'Brock oppose the movants' intervention.

> to intervene either in support of or opposition to the position of the party to the case regarding the constitutionality of the provision or amendment.

2 U.S.C. § 437h note. Because the plaintiffs have challenged numerous provisions of the Act on constitutional grounds, section 403(b) plainly confers upon each and every one of the movants an unconditional statutory right to intervene in the consolidated actions now before us.

The objectors argue that the standing inquiry does not end with the satisfaction of Rule 24(a)(1). Under Article III of the United States Constitution, our "judicial Power" extends only to live "Cases" or "Controversies". U.S. Const. art. III. The D.C. Circuit has long held that "because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene . . . must satisfy the same Article III standing requirements as original parties." *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1285 (D.C. Cir. 1994); *see S. Christian Leadership Conf. v. Kelley*, 747 F.2d [*5] 777, 779 (D.C. Cir. 1984); *see also Mausolf v. Babbit*, 85 F.3d 1295, 1300 (8th Cir. 1996) ("An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party, must have standing as well.").[2]

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[2]In *Diamond v. Charles*, 476 U.S. 54 (1986), the United States Supreme Court held that an intervenor seeking to continue its suit in the absence of the party on whose side intervention was permitted must demonstrate that it fulfills the standing requirements of Article III. *See id.* at 68. Nonetheless, the Court reserved for another day the broader question of whether an intervenor must have Article III standing where the party on whose side intervention is sought remains in litigation. *See id.* at 68-69. The circuits are split on that issue. *See Ruiz v. Estelle*, 161 F. 3d 814, 831-32 (5th Cir. 1998) (D.C., Seventh and Eighth Circuits require intervenors to have Article III standing while Second, Fifth, Sixth, Ninth, and Eleventh Circuits do not).

Building & Construction Trades and *Kelley* address the question of Article III standing under Rule 24(a)(2) as opposed to Rule 24(a)(1). To date, neither the Supreme Court nor the D.C. Circuit has specifically addressed whether an Article III standing analysis is as appropriate in the Rule 24(a)(1) context as it is in the Rule 24(a)(2) context. The movants suggest that "[t]he argument for a relaxed rule of standing where the intervenor has an unconditional statutory right to participate seems . . . stronger than the argument for relaxed standing in the (a)(2) context." Movants' Reply at 5 n.3. However, we see no need in this case to address that distinction or to resolve the question whether the movants must satisfy the constitutional requirements of standing – i.e., that they have suffered or will suffer "an injury in fact" which is "concrete and particularized," "actual [*6] or imminent," "fairly . . .trace[able] to the challenged action" and "redress[able] by a favorable decision," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted)–because we believe, as discussed below, that the movants have satisfied those requirements in any event.

The movants allege that

> [a]s federal officeholders and candidates for, or potential candidates for, election to federal office, they are among those whose conduct the Act regulates, and among those whom the Act seeks to insulate from the actual or apparent corrupting influence of special interest money. They want to run in elections, participate in a political system, and serve in a government in which all participants comply with the reasonable contribution restrictions and other federal campaign finance regulations that the Act imposes in order to stop

> evasion and to prevent actual and apparent corruption. If any of the reforms embodied in the Act are struck down, . . . [the] movants will once again be forced to attempt to discharge their public responsibilities, raise money, and campaign in a system that [they believe to be] significantly corrupted by special-interest money.

Mem. in Supp. of Mot. to Intervene at 3-4; *see Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury . . . may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." (internal quotations and alteration omitted)); 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1914, at 418 (2d ed. 1986) (intervention pleading "is construed liberally in favor of the pleader and the court will accept as true the well-pleaded allegations" therein). These allegations are sufficient to support Article III standing.

The objectors' contrary position that (1) the movants "have not shown that they [*7] have an interest distinct from that of every other citizen," Opp'n at 8; (2) the movants have no legally protected interest "as sponsors and supporters" of the Act or "in upholding an unconstitutional statute," *id.* at 8, 10; and (3) any injury the movants suffer cannot be redressed by a favorable decision, *see id.* at 12, is, simply stated, without merit.

First, as opposed to members of the general public, the movants have a concrete, direct, and personal stake–as candidates and potential candidates–in the outcome of a constitutional challenge to a law regulating the processes by which they may attain office. *See Buchanan v. FEC*, 112 F. Supp. 2d 58, 65 (D.D.C. 2000) ("Precluding candidates from challenging [election] rules under the FECA would leave few others to do so . . . [I]t is relatively self-evident

that the people who have the most to gain and lose from the criteria governing [the election process] are the candidates themselves."); *see also Vote Choice, Inc. v. DeStefano*, 4 F.3d 26, 37 (1st Cir. 1993) ("[A]n impact on the strategy and conduct of an office-seeker's political campaign constitutes an injury of a kind sufficient to confer standing." (citing *Buckley v. Valeo*, 424 U.S. 1, 12 & n.10 (1976) (per curiam))). The objectors have cited no case law to the contrary.

Second, notwithstanding the objectors' assertions, *see* Opp'n at 8-9, the movants do not seek to vindicate a "sponsorship" interest in the Act. Nor are they precluded from intervening to *defend* (rather than challenge) the Act. In arguing that "no litigant has a legally protected interest in upholding an unconstitutional statute," *id.* at 10, the objectors conflate the threshold issue of standing with the merits of the case and ignore the fact that BCRA provisions the movants seek to defend are presumed constitutional until proven [*8] otherwise. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). Moreover, a movant may intervene in support of government defendants where "it will be injured in fact by the setting aside of the government's action it seeks to defend," the "injury will have been caused by that invalidation" and "the injury would be prevented if the government action is upheld." *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 156 (D.D.C. 2001); *see also Meek v. Metro Dade County*, 985 F.2d 1471, 1480 (11th Cir. 1993) (movants seeking to intervene in defense of "election system that governed their exercise of political power" sufficiently "alleged a tangible actual or prospective injury" under *Lujan*); *Marshall v. Meadows*,

921 F. Supp. 1490, 1492 (E.D. Va. 1996) (U.S. Senator seeking intervention to defend constitutionality of state election law permitted to intervene because he had "a vital interest in a procedure through which he [sought] election").

Finally, the injury the movants allege here – that they will be forced to raise money in a corrupt system *in the event the Act is struck down* – plainly would be redressed by a favorable decision *upholding* the Act's provisions. Accordingly, because it is clear from the face of the pleadings that the movants have an unconstitutional statutory right – and Article III standing – to seek such a decision, it is this 3rd day of May, 2002 hereby [*9]

ORDERED that the objectors' request for an oral hearing on the motion to intervene is denied, *see Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 693-94 (1961) (district court had discretion to decide motion to intervene without hearing when result was clear from face of application); and it is further

ORDERED that the motion to intervene is granted.

SO ORDERED.

/s/ Karen LeCraft Henderson
KAREN LECRAFT HENDERSON
United States Circuit Judge

/s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge